

# EXHIBIT E

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 CITY OF NEW YORK,

4 Plaintiff,

New York, N.Y.

5 v.

18 Civ. 848 (PAE)

6 H&H DISTRIBUTORS, et al.,

7 Defendants.

-----x

Conference

8 September 24, 2018  
9 2:30 p.m.

10 Before:

11 HON. PAUL A. ENGELMAYER,

12 District Judge

13 APPEARANCES

14 ZACHARY W. CARTER

15 Corporation Counsel of the City of New York

16 BY: ERIC PROSHANSKY

17 Assistant Corporation Counsel

18 CLAYMAN & ROSENBERG, LLP

19 Attorneys for Defendants H&H Distributors and

20 Shareef Hassan

21 BY: PAUL S. HUGEL

22 CHRISTINA M. CORCORAN

23 GERALD J. McMAHON

24 Attorney for Defendants Mussa Hamza, Akram Shamakh,  
25 and Anwar Alsaiddi

26 BLEAKLEY PLATT & SCHMIDT, LLP

27 Attorneys for Defendant Amjed Hatu

28 BY: WILLIAM M. MURPHY



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(Discussion off the record)

THE COURT: Good afternoon. Let me begin by thanking counsel for their thorough briefing in advance of today's initial pretrial conference. As you know, I had previously indicated that this conference would serve as an oral argument on the pending motions to dismiss. Upon further reflection, however, I determined that oral argument would not be necessary. I hope that my decision did not occasion any wasted effort.

With that, I am going to resolve from the bench, right now, the pending motions to dismiss. I will put on the record an explanation of the reasons for my ruling. There will not be a written decision. Instead, the court will issue only a brief bottom-line order setting out the disposition of the motions. So if the reasons for the court's ruling are important to you, you will need to order the transcript.

I am going to grant the motions. Specifically, I have concluded that the claims against defendants H & H Distributors, Amjed Hatu, and Shareef Hassan must be dismissed for want of personal jurisdiction. Accordingly, I will dismiss all claims against them without prejudice. Once I have finished reading this bench decision, I will therefore take up with Mr. Proshansky and Mr. McMahon, who represent the remaining parties, how discovery in this case ought to proceed for their clients, the only remaining parties to this

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litigation.

I am now going to explain why defendants' motions must be granted. In deciding these motions, I have assumed all well-pled factual allegations in the amended complaint to be true and drawn all reasonable inferences in plaintiff's favor. See *Koch v. Christie's International PLC*, 699 F.3d 141, 145 (2d Cir. 2012). I note, however, that I have not considered the affidavit of Detective Jonathan Dubroff. That document was first offered by defendants H & H Distributors and Mr. Hassan as an exhibit supporting their motion to dismiss, see Dkt. 37-3, and then cited repeatedly by the City in its opposition brief, see Dkt. 36. This document clearly is not cognizable on the instant motions. It is neither incorporated by reference in the amended complaint nor integral to it. In fact, it is not referenced in the amended complaint at all. And although I may take judicial notice of the fact that it was filed in a New York State judicial proceeding, I may not assume the truth of the matters asserted therein. See *Global Network Communications, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006). That defendants improperly sought to introduce this document is of no moment; neither party, including the plaintiff, may rely on this document in litigating these motions to dismiss. Accordingly, the Dubroff affidavit plays no role in my decision today.

Moving on to the facts put at issue in the amended

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1 complaint, this case is brought by the City of New York, or as  
2 I will refer to it, the "City," against six defendants.  
3 Defendant H & H Distributors, or "H & H," is a wholesale  
4 cigarette distributor in North Carolina. As of the filing of  
5 the amended complaint, the principals of H & H were defendants  
6 Ajmed Hatu and Shareef Hassan. I am going to refer to those  
7 defendants -- H & H, Hatu, and Hassan -- collectively as the  
8 H & H defendants. Defendants Mussa Hamza, Akram Shamakh, and  
9 Anwar Alsaiddi are retailers who deal in cigarettes from  
10 convenience stores in North Carolina. I will refer to these  
11 defendants collectively as "the North Carolina retailers."

12 The City alleges that defendants all participated in an  
13 unlawful cigarette distribution scheme. Per the amended  
14 complaint, New York State and New York City impose a combined  
15 \$58.50 in excise taxes per carton of cigarettes. North  
16 Carolina imposes only \$4.50 in analogous taxes. Because these  
17 excise taxes are prepaid and therefore incorporated into the  
18 retail price of cigarettes, cigarettes are considerably more  
19 expensive in New York City than in North Carolina.

20 The City alleges that defendants, along with other  
21 members of what the City calls the "Moflehi Enterprise,"  
22 capitalized on this opportunity for arbitrage. As alleged,  
23 their scheme worked as follows. A member of the Moflehi  
24 Enterprise in New York would transmit an order via text message  
25 to a so-called "transporter" requesting a variety of cigarette

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1 brands and styles. The transporter would then transmit that  
2 order via text message -- using roughly the same language -- to  
3 one of the North Carolina retailers. The retailer in turn  
4 would transmit the order, again via nearly identical text  
5 message, to one of the H & H defendants. The H & H defendants  
6 would then legally purchase cigarettes from manufacturers and  
7 other distributors in North Carolina and then sell those  
8 cigarettes at wholesale to one of the retailers. The retailer  
9 in turn would pass the cigarettes along to one of the  
10 transporters, likely the transporter who originally placed the  
11 order, who would then deliver the cigarettes to New York. Upon  
12 receiving the imported cigarettes in New York, other members of  
13 the enterprise would then affix counterfeit New York tax stamps  
14 to the packaging and sell the cigarettes in New York at  
15 below-market prices.

16 All agree that the H & H defendants operated only in  
17 North Carolina and directly sold cigarettes only to the North  
18 Carolina retailers. There is no allegation that the H & H  
19 defendants ever communicated directly with anyone operating in  
20 any other state. Nevertheless, the City alleges that the H & H  
21 defendants knew that the cigarettes they supplied were destined  
22 for illegal distribution in New York City. In support, the  
23 City cites the following.

24 First, at paragraphs 55 to 61 of the amended complaint,  
25 the City describes a telephone conversation between Mr. Hatu

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1 and Mr. Hassan that took place approximately one week after two  
2 transporters were stopped by the New York City Police  
3 Department, or "NYPD," while delivering cigarettes in New York  
4 City. In this conversation, Mr. Hatu told Mr. Hassan that,  
5 earlier in the week, "Mussa and Akram's guy" had been "robbed  
6 on the highway" of 6,000 cartons of cigarettes. The City  
7 alleges that "Mussa" and "Akram" likely refer to defendants  
8 (and North Carolina retailers) Mussa Hamza and Akram Shamakh  
9 and that the "robbery" was in fact the NYPD stop I just  
10 mentioned. On the same call, Mr. Hatu also noted that "they"  
11 had been "hit" for \$90,000 six months ago by the same two  
12 "robbers." This portion of the conversation, the City alleges,  
13 likely referred to another NYPD seizure that had taken place  
14 approximately four months prior in which the NYPD seized  
15 approximately \$100,000 from a vehicle operated by a Moflehi  
16 Enterprise transporter. *Id.* According to the amended  
17 complaint, Mr. Hatu and Mr. Hassan then observed that "they" --  
18 another likely reference to Moflehi Enterprise transporters per  
19 the amended complaint -- "probably need to get a new car and  
20 find a different way to go."

21 Next, the City alleges that the H & H defendants'  
22 knowledge can be inferred from two facts related to their  
23 delivery of cigarettes:

24 First, in paragraph 62 of the amended complaint, the  
25 City alleges that on "several occasions" cigarette orders were



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1 picked up directly from H & H by transporters in cars bearing  
2 out-of-state license plates. At least one of these cars, the  
3 City alleges, had New Jersey plates.

4 Second, in paragraph 63 of the amended complaint, the  
5 City alleges that H & H occasionally delivered cigarette orders  
6 not into the North Carolina retailers' stores, but instead  
7 directly into vehicles outside those stores operated by the  
8 North Carolina retailers or "others." The City alleges that  
9 these cigarettes would then be driven to the North Carolina  
10 retailers' residences and from there transferred into  
11 transporters' vehicles

12 And finally, at paragraphs 65 to 87, the amended  
13 complaint provides statistics related to the relative  
14 popularity of particular cigarette brands in different markets.  
15 The City argues that these statistics tend to suggest that  
16 H & H's sales were consistent with serving customers in New  
17 York City, as opposed to North Carolina.

18 On the strength of these allegations, the amended  
19 complaint seeks relief against the H & H defendants under five  
20 statutes.

21 First, the City raises claims under the Contraband  
22 Cigarette Trafficking Act (or "CCTA") 18 U.S.C. § 2341 and  
23 following. This statute makes it a felony for "any person  
24 knowingly to ship, transport, receive, possess, sell,  
25 distribute, or purchase contraband cigarettes." *Id.* § 2342.

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1 The phrase "contraband cigarettes" refers to "a quantity in  
2 excess of 10,000 cigarettes, which bear no evidence of the  
3 payment of applicable state or local cigarette taxes in the  
4 state or locality where such cigarettes are found," and which  
5 are in the possession of a person not authorized by statute to  
6 possess such cigarettes. *Id.* § 2341.

7 Second, the City raises claims under the racketeering  
8 statute, 18 U.S.C. 1961 *et seq.* This statute makes it unlawful  
9 for any person employed by or associated with any enterprise  
10 engaged in or affecting interstate commerce to conduct or  
11 participate, directly or indirectly, in the conduct of such  
12 enterprise's affairs through a pattern of racketeering  
13 activity. As relevant here, "racketeering activity" includes  
14 trafficking in contraband cigarettes in violation of the CCTA.

15 Third, the City claims that the defendants conspired to  
16 violate RICO by agreeing to assist in the cigarette trafficking  
17 efforts of the Moflehi Enterprise.

18 Fourth, the City raises claims under the Prevent All  
19 Cigarette Trafficking Act, or the "PACT Act," which amended the  
20 Jenkins Act, 15 U.S.C. §§ 375 *et seq.* This statute prohibits a  
21 wide array of conduct, including delivering cigarettes into a  
22 state or locality without (1) first filing a statement with the  
23 Attorney General of the United States and the tax  
24 administrators of the state; (2) filing monthly reports of all  
25 cigarette shipments with the tax administrators of the state;

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(3) complying with state and local laws governing the sale of cigarettes; (4) complying with certain shipping and packaging requirements; and (5) using a method of shipping that requires the person who receives the delivery to provide age verification.

Finally, the City raises claims under New York Public Health Law, or "PHL," Section 1399-11. That statute provides that, in New York State, cigarettes may be shipped only to licensed cigarette tax agents or wholesale dealers, export warehouse proprietors, or government officials.

The H & H defendants filed the instant motions on June 14, 2018, after the City amended its complaint in response to defendants' original motions to dismiss. In separate briefs -- one filed on behalf of Mr. Hatu, see Dkt. 34, and another filed on behalf of H & H and Mr. Hassan, available at Dkt 36 -- these defendants raise a host of arguments about each of the statutes implicated here. At bottom, however, each brief rests primarily on the argument that the amended complaint fails to plausibly allege that the H & H defendants knew that the cigarettes they sold in North Carolina would be transported to New York.

This argument gives rise to two potential bases for dismissal: First, under Federal Rules of Civil Procedure 12(b)(2), that the amended complaint should be dismissed against the H & H defendants for lack of personal jurisdiction;

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1 and, second, under Rule 12(b)(6), that the amended complaint  
2 fails to state a plausible claim against the H & H defendants.  
3 I will note parenthetically that although Mr. Hatu does not  
4 raise any of his own arguments as to personal jurisdiction, he  
5 expressly adopts his codefendants' arguments on that score.  
6 See Dkt. 34 at 2, n.1.

7 Under these circumstances, where defendants raise a  
8 combination of Rule 12 defenses, I am constrained to address  
9 the issue of personal jurisdiction first. For that  
10 proposition, I would cite *Backus v. U3 Advisors, Inc.*, 2017 WL  
11 3600430 at \*10 (S.D.N.Y. Aug. 18, 2017), as well as the Second  
12 Circuit's *en banc* decision authored by Judge Friendly, in  
13 *Arrowsmith v. United Press International*, 320 F.2d 219, 221 (2d  
14 Cir. 1963).

15 With regard to personal jurisdiction, "the plaintiff  
16 bears the burden of establishing that the court has  
17 jurisdiction over the defendant." See *DeStefano v. Carozzi*  
18 *North America, Inc.*, 286 F.3d 81, 84 (2d Cir. 2001). The  
19 showing that a plaintiff must make to defeat a defendant's  
20 claim that the court lacks personal jurisdiction over it varies  
21 depending upon the procedural posture of the litigation. See  
22 *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197  
23 (2d Cir. 1990). Where, as here, a district court decides a  
24 Rule 12(b)(2) motion on the pleadings, plaintiffs need make  
25 only a *prima facie* showing of personal jurisdiction. See

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1     *Southern New England Telephone Company v. Global NAPs, Inc.*,  
2     624 F.3d 123, 138 (2d Cir. 2010). In other words, the  
3     plaintiff must aver facts that, "if credited, would suffice to  
4     establish jurisdiction over the person." *Id.* (citation  
5     omitted). The court must "construe the pleadings and  
6     affidavits in the light most favorable to the plaintiff,  
7     resolving all doubt in its favor." See *Dorchester Financial*  
8     *Securities, Inc. v. Banco BRJ S.A.*, 722 F.3d 81, 85 (2d Cir.  
9     2013). However, the court will not "draw argumentative  
10    inferences in the plaintiff's favor" and need not "accept as  
11    true a legal conclusion couched as a factual allegation."  
12    Citing *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673  
13    F.3d 50, 59 (2d Cir. 2012).

14           In a federal question case such as this, determining  
15    whether the court has personal jurisdiction over a foreign  
16    defendant requires a two-step inquiry. I cite here a second  
17    decision of the Court of Appeals in the *Licci* matter, this one  
18    reported at 732 F.3d 161, 168 (2d Cir. 2013). First, the court  
19    "looks to the law of the forum state to determine whether  
20    personal jurisdiction will lie," or, if a federal statute  
21    specifically provides for national service of process, to that  
22    statute instead, see *PDK Labs, Inc., v. Friedlander*, 103 F.3d  
23    1105, 1108 (2d Cir. 1997). Then, if there is a statutory basis  
24    for exercising personal jurisdiction, the court must "consider  
25    whether the . . . exercise of personal jurisdiction over a

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1 foreign defendant comports with due process protections  
2 established under the United States Constitution." Citing  
3 *Licci*, 732 F.3d at 168; and the ancient case of *International*  
4 *Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

5 At the first step of the personal jurisdiction inquiry,  
6 the parties agree that RICO provides its own statutory basis  
7 for jurisdiction. See 18 U.S.C. § 1965. They disagree,  
8 however, as to which provision of New York's long-arm  
9 statute -- Section 302 of New York's CPLR -- governs the  
10 balance of the city's claims. I am going to first address  
11 whether a statutory basis for jurisdiction exists under RICO,  
12 and then I will proceed to consider CPLR § 302.

13 18 U.S.C. § 1965(a) grants personal jurisdiction over an  
14 initial defendant in a civil RICO case to the district court  
15 for the district in which the person resides, has an agent, or  
16 transacts his or her affairs. In other words, "a civil RICO  
17 action can only be brought in a district court where personal  
18 jurisdiction based on minimum contacts is established as to at  
19 least one defendant." Citing *PT United Can Co. v. Crown Cork &*  
20 *Seal Co.*, 138 F.3d 65, 71 (2d Cir. 1998). As I will explain  
21 shortly, the amended complaint does not establish minimum  
22 contacts with respect to the H & H defendants. That is  
23 independently dispositive of the personal jurisdiction analysis  
24 from a constitutional perspective. But for purposes of the  
25 statutory analysis, it is not dispositive of whether RICO

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1 provides a basis for jurisdiction. That is because the court  
2 may assume *arguendo* that the amended complaint establishes  
3 personal jurisdiction over at least one of the other  
4 defendants -- the North Carolina retailers -- who have not  
5 challenged the amended complaint on this or any other ground.

6 Proceeding on that assumption, Section 1965(b)  
7 provides for jurisdiction over "other parties" not residing in  
8 the district, including codefendants, where the "ends of  
9 justice" so require. Citing *PT United*, 138 F.3d at 71. This  
10 limitation reflects RICO's "first preference . . . to bring the  
11 action where suits are normally expected to be brought" rather  
12 than "haling defendants into far-flung fora." *Id.* at 71-72.  
13 Here there is no question that an alternative forum exists  
14 where personal jurisdiction may be exercised over all  
15 defendants: North Carolina, where all defendants reside.  
16 Accordingly, the City has not established personal jurisdiction  
17 over the H & H defendants under RICO.

18 With respect to its non-RICO claims, the City also has  
19 not established personal jurisdiction over the H & H defendants  
20 under the CPLR. CPLR § 302 governs jurisdiction over  
21 non-domiciliaries acting either in person or through an agent.  
22 The parties dispute whether the statutory violations alleged  
23 here implicate CPLR § 302(a)(1) which concerns business  
24 transactions within the state, Section 302(a)(2), which  
25 concerns torts committed within the state, or Section

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302(a)(3), which concerns torts committed outside of the state which cause injury within the state, where, as relevant here, the non-domiciliary expected or reasonably should have expected that the act would have consequences in the state, and also derives substantial revenue from interstate commerce

The parties' dispute over which provision properly applies is ultimately academic. The City has established jurisdiction under none of these provisions; and that is because, at bottom, the amended complaint fails to plausibly allege as a matter of fact that the H & H defendants knew that any of the cigarettes they sold were destined for resale in New York.

To reiterate, there is no allegation that the H & H defendants ever set foot in New York or negotiated with New York parties. Instead, as alleged, the H & H defendants communicated only with each other and with defendant Hamza, a North Carolina retailer who himself is not alleged to have set foot in New York. Thus, for purposes of Sections 302(a)(1) and (a)(2), jurisdiction will lie only if the H & H defendants acted in New York through an agent or, as the City would have it, as part of a conspiracy. Accordingly, the amended complaint must support a plausible inference that a member of the Moflehi Enterprise acted in New York with the "knowledge and consent" of the H & H defendants, or that the H & H defendants and their alleged coconspirators in New York acted



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1 with a "common purpose by common agreement or understanding."  
2 Citing *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 122-23 (2d  
3 Cir. 1981). Similarly, for the purposes of Section 302(a)(3),  
4 the City must plausibly allege that the H & H defendants knew  
5 or reasonably should have known that their acts would have  
6 consequences in New York. The amended complaint can support  
7 none of these inferences.

8 The City repeatedly offers the conclusory allegation that  
9 the H & H defendants had "full knowledge that the North  
10 Carolina retailers intended to and did in fact transfer the  
11 cigarettes to the Moflehi Enterprise for distribution and sale  
12 in New York City. See Amended Complaint paragraph 41; *Id.*  
13 paragraph 98. The court need not credit allegations such as  
14 these for purposes of a motion to dismiss. The court therefore  
15 puts those allegations to one side, leaving, at most, five  
16 concrete allegations to ostensibly support the inference of the  
17 H & H defendants' knowledge. Even in combination, however,  
18 these allegations cannot support the exercise of personal  
19 jurisdiction.

20 First, the City points to its allegations concerning the  
21 disparate cigarette taxes in New York and North Carolina. See  
22 Amended Complaint paragraphs 7, 27. From these allegations,  
23 the City invites the inference that the H & H defendants knew  
24 that North Carolina cigarettes can be sold for a profit in New  
25 York. See Dkt. 55 at 11. But the amended complaint alleges

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1 only the fact of a tax disparity, not the H & H defendants'  
2 knowledge of that disparity and, in any event, whether  
3 individuals knew of an opportunity for profit says almost  
4 nothing about whether they knew of others around them taking  
5 advantage of that opportunity.

6 Second, the City alleges that the H & H defendants  
7 sometimes delivered cigarettes to cars bearing out-of-state  
8 plates, including, in at least one instance, plates from New  
9 Jersey. See Amended Complaint paragraph 62. The amended  
10 complaint does not allege that the H & H defendants knew that  
11 the drivers of these vehicles were involved with the Moflehi  
12 Enterprise. Rather, the City appears to rely on two unstated  
13 assumptions: first, that the H & H defendants knew that the  
14 vehicles had out-of-state license plates; and, second, that  
15 vehicles with out-of-state plates are more likely to deliver  
16 goods out of state. These are not matters of common-sense  
17 intuition. Whether wholesalers typically examine the license  
18 plates of delivery vehicles and whether out-of-state license  
19 plates should trigger suspicion of illegal smuggling turns on  
20 facts that are simply not alleged here. And further, even if  
21 they were, the amended complaint does not allege, and the City  
22 has not explained, why these vehicles -- even ones with New  
23 Jersey plates -- would be particularly likely to travel to New  
24 York as opposed to some other out-of-state forum.

25 Third, the City alleges that, at least occasionally,

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1 orders delivered by H & H to the North Carolina retailers'  
2 stores would be loaded directly into the retailers' vehicles.  
3 See Amended Complaint paragraph 63. This allegation suggests  
4 that the H & H defendants knew, at least on certain occasions,  
5 that the retailers planned to do something with the cigarettes  
6 other than sell them out of the particular stores to which they  
7 had been delivered. But the amended complaint itself alleges  
8 that each of the North Carolina retailers owned or was employed  
9 by multiple convenience stores in North Carolina. See Amended  
10 Complaint paragraphs 7, 19-21. That the cigarettes were not  
11 destined for sale at a particular store, therefore, does not  
12 raise a plausible inference that the cigarettes were destined  
13 for illegal sale somewhere outside of North Carolina. And  
14 further, even if the allegations did support an inference of  
15 illegal distribution outside of North Carolina, they still  
16 would not support the inference necessary here: that the  
17 cigarettes were intended for New York. This piece of evidence  
18 does not point, at all, to New York.

19 Fourth, the amended complaint describes a phone call  
20 between Mr. Hatu and Mr. Hassan in which Mr. Hatu informed  
21 Mr. Hassan that earlier in the week, "Mussa and Akram's guy"  
22 had been "robbed on the highway" of 6,000 cartons of  
23 cigarettes. Mr. Hatu then told Mr. Hassan that "they" had also  
24 been "hit" for \$90,000 six months ago by the same two  
25 "robbers." Mr. Hatu and Mr. Hassan then agree that "they"

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1 "probably need to get new car and find a different way to go."

2 See Amended Complaint paragraphs 55-61.

3 The City understands this back-and-forth as coded dialogue  
4 referring to the operations of the Moflehi Enterprise. To wit,  
5 the City alleges that Mussa and Akram are defendants Mussa  
6 Hamza and Akram Shamakh; that the "robbery" they referred to  
7 was an episode one week prior to the phone call in which two  
8 transporters had their cargo of cigarettes seized by the NYPD  
9 in New York City; that "they" are transporters in the Moflehi  
10 Enterprise; and that the "hit" was an episode four months prior  
11 in which the NYPD seized \$100,000 from one of the Moflehi  
12 Enterprise's transporters. See Amended Complaint paragraph  
13 59-61.

14 There are two problems with this pleading as a basis for  
15 establishing personal jurisdiction in New York. First, even  
16 granting that Mr. Hatu was relating a story told to him by  
17 Mr. Hamza, this conversation referring to a "robbery" does not  
18 suggest that the H & H defendants understood themselves to be  
19 involved with interstate smuggling. True, the City alleges  
20 that Mr. Hatu and Mr. Hassan discussed how the "loss of income  
21 from the seized product would make things different for them."  
22 Amended Complaint paragraph 61. But even if "them" in that  
23 sentence refers to Hatu and Hassan, which is not altogether  
24 clear, a robbery affecting one of their retail clients  
25 naturally would affect ongoing business with that client. A

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1 pattern of robberies of the product by robbers, as opposed to  
2 seizures by law enforcement, would also be of concern to H & H.  
3 And the word "robbery" is quite an inexact formulation for a  
4 person referring to a seizure by law enforcement. The use of  
5 that term may suggest, if anything, that the H & H defendants  
6 were deliberately told a false cover story about a robbery to  
7 account for the loss of the product, because it was  
8 disadvantageous to tell them that the people with whom they  
9 were doing business were in fact interstate smugglers. Such  
10 knowledge might have scared them away from continued sales,  
11 lest they run the risk of criminal prosecution or the sort of  
12 enforcement action pursued here. While it is certainly  
13 possible that the word "robbery" was understood by the H & H  
14 defendants to refer to a seizure of contraband by law  
15 enforcement, that proposition is, on the pleadings, no more  
16 than speculative.

17 Second, and more important, nothing in the alleged  
18 conversation refers to New York. It does not situate the  
19 "robbery" in New York, or indeed outside of North Carolina.  
20 Even assuming that the "robbery" were taken as a proxy for a  
21 seizure of the cigarettes by law enforcement agents  
22 investigating interstate smuggling, on the facts pled, the  
23 seizure could have been by law enforcement anywhere. It is  
24 speculative to contend that the H & H defendants, in being told  
25 about a "robbery," were told that the robbery, actually a

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1 seizure, occurred in New York or related to smuggling in New  
2 York. Plaintiffs do not explain why it logically follows that  
3 the H & H defendants would have been told the situs of the  
4 purported robbery. This episode thus does not demonstrate the  
5 H & H defendants' knowledge of goings-on in New York  
6 specifically.

7 Fifth, and finally, the City offers a lengthy analysis  
8 concerning the relative popularity of certain brands of  
9 cigarettes in New York City as compared to North Carolina. See  
10 Amended Complaint paragraphs 65-87. In short, the City alleges  
11 that Newport cigarettes are trafficked into New York City more  
12 often than any other brand, and that Marlboro is the most  
13 popular cigarette in North Carolina. The City draws from this  
14 data the inference that a *bona fide* North Carolina wholesaler  
15 would sell more Marlboros than Newports, whereas a seller  
16 hoping to target New York would sell more Newports. H & H, the  
17 City alleges, sold considerably more Newports than Marlboros.

18 To its credit, the City recognizes in its opposition  
19 brief that these allegations cannot support an inference about  
20 the H & H defendants' knowledge. See Dkt. 55 at 12-13.  
21 Rather, the City argues, these statistics raise a plausible  
22 inference that the cigarettes provided by H & H were in fact  
23 destined for New York City. That point, however, is immaterial  
24 to the present analysis, which turns on the H & H defendants'  
25 knowledge. Nevertheless, I note that I have some doubts even

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1 about the plausibility of the City's inference. As the City  
2 concedes, its data do not discriminate among different  
3 sub-markets in North Carolina. Brand preferences in those  
4 sub-markets may differ substantially from those obtaining in  
5 North Carolina as a whole. And indeed, plaintiffs contends  
6 that Newports are considerably more popular than Marlboros in  
7 the particular sub-market that H & H services. If that is so,  
8 this market-specific information would largely account for  
9 H & H's seemingly unusual sales portfolio. Further, even if  
10 H & H's sales were more consistent with sales to New York City  
11 than the relevant sub-market, that fact says nothing about the  
12 likelihood that H & H's sales actually proceeded to New York  
13 City as opposed to other markets with similar cigarette  
14 preferences. In the end, in any event, I will not linger on  
15 this point given that the City concedes that these allegations  
16 do not support an inference to the as to the H & H defendants'  
17 knowledge.

18 Having reviewed all of these allegations, I conclude that  
19 the amended complaint cannot support an inference that the  
20 H & H defendants knew of any activity in New York, whether for  
21 purposes of CPLR Section 302(a)(1), (a)(2), or (a)(3). To be  
22 sure, the City's allegations must be taken in concert, rather  
23 than dissected piecemeal. But even stacking this series of  
24 weak inferences together does not give rise to a plausible  
25 inference of knowledge as to events in New York. Accordingly,

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1 there is no basis for statutory jurisdiction here

2 The foregoing is sufficient to inter the City's claims  
3 against the H & H defendants. Nonetheless, for the sake of  
4 thoroughness, I will now explain why the exercise of  
5 jurisdiction also would not comport with due process.

6 Where, as here, the plaintiff asks the court to assert  
7 specific jurisdiction over foreign defendants, the due process  
8 inquiry consists of two components: the "minimum contacts"  
9 inquiry and the "reasonableness" inquiry. See *Licci* 673 F.3d  
10 at 60. The minimum contacts inquiry asks whether a defendant  
11 has engaged in "purposeful availment" -- that is, whether the  
12 defendant's contacts demonstrate an intent to invoke the  
13 benefits and privileges of the forum's law, such that the  
14 defendant should reasonably anticipate be haled into court  
15 there. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462,  
16 472-75 (1985). The second part of the due process analysis  
17 asks "whether the assertion of personal jurisdiction comports  
18 with traditional notions of fair play and substantial  
19 justice -- that is, whether it is reasonable under the  
20 circumstances of the particular case." *Bank Brussels Lambert*  
21 *v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129 (2d Cir.  
22 2002).

23 The City fails at the first step. In evaluating whether  
24 the defendant has purposefully established minimum contacts,  
25 the court looks to the "quality and nature" of the defendant's



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1 contacts under the totality of the circumstances. See *Best Van*  
2 *Lines v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007) (quoting  
3 *Burger King* 471 U.S. at 475). "Random, fortuitous, or  
4 attenuated contacts" will not suffice to confer jurisdiction  
5 nor will "the unilateral activity of another party or third  
6 person," citing *Burger King* at the same page. Likewise, that a  
7 defendant might foresee injury in the forum state is  
8 insufficient. *Id.* at 474. Rather, the defendant must have  
9 "purposefully directed" efforts towards another state, such  
10 that he could foresee being haled into court there. *Id.* at  
11 476.

12 As I have explained, the amended complaint doesn't give  
13 rise to a plausible inference that the H & H defendants knew  
14 that they were taking place in a cigarette bootlegging  
15 enterprise. It follows *a fortiori* that they did not  
16 purposefully direct their conduct at New York. There is no  
17 plausible allegation that the H & H defendants purposefully  
18 availed themselves of New York by "directing their agents" to  
19 operate in New York. *Charles Schwab Corp.*, 883 F.3d 68, 86  
20 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 135 n. 13 (2014)).  
21 Nor is there any plausible allegation that these defendants  
22 agreed to participate in a conspiracy such that their alleged  
23 coconspirators' contacts with New York might suffice to confer  
24 jurisdiction. See *Id.* at 87. And finally, the City may not  
25 rely on the "effects test" theory of personal jurisdiction

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1 under which "the conduct that forms the basis for the  
2 controversy occurs entirely out-of-forum, and the only relevant  
3 jurisdictional contacts with the forum are therefore in-forum  
4 effects harmful to the plaintiff. *Licci*, 732 F.3d 173. Under  
5 that theory, the City would have to plausibly allege  
6 "intentional . . . actions expressly aimed at" New York.  
7 *Calder v. Jones*, 465 U.S. 783, 789 (1984). As I have  
8 explained, the H & H defendants' conduct here, as alleged, did  
9 not rise to the level of knowing, let alone intentional,  
10 activity directed at New York.

11 At bottom, the City has not plausibly alleged that the  
12 H & H defendants purposefully directed conduct at New York.  
13 For that reason, the City has not established the H & H  
14 defendants' minimum contacts with New York. Accordingly, the  
15 City may not exercise jurisdiction over those defendants  
16 consistent with due process. The case must therefore be  
17 dismissed as against those defendants.

18 Now, a dismissal for want of personal jurisdiction is  
19 without prejudice. See *Smith v. United States*, 554 F.App'x 30,  
20 32 (2d Cir. 2013). This dismissal, therefore, is without  
21 prejudice to the city's right to bring renewed claims against  
22 the H & H defendants, should the City be able to fortify its  
23 jurisdictional allegations. I note, however, that as currently  
24 pled, at least three of the city's claims against the H & H  
25 defendants would have failed to state a plausible claim for

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1 relief. That is so much for the same reasons that I have  
2 reviewed in connection with personal jurisdiction. The CCTA on  
3 which plaintiffs' RICO and RICO conspiracy claims are  
4 predicated requires as an element the knowing distribution of  
5 contraband cigarettes: "It shall be unlawful for any person  
6 knowingly to ship, transport, receive, possess, sell,  
7 distribute, or purchase contraband cigarettes or contraband  
8 smokeless tobacco." 18 U.S.C. 2342(a). And for the reasons I  
9 have just stated, the City has not adequately pled the H & H  
10 defendants' knowledge that the cigarettes they distributed were  
11 destined to be contraband. Accordingly, the City's allegations  
12 could not have supported liability under the CCTA or RICO. It  
13 is somewhat less clear whether, under the circumstances here,  
14 the City's claims for violations of the PACT Act and PHL  
15 require proof of knowledge on the H & H defendants' part.  
16 Because I have dismissed for lack of personal jurisdiction,  
17 however, I need not and will not resolve that question. It is  
18 enough, for now, that the amended complaint is dismissed  
19 without prejudice as against the H & H defendants.

20 With that, the bench decision is concluded, and we will  
21 proceed with an initial pretrial conference.

22 I am going to take about a five-minute recess, and I will  
23 ask counsel for the remaining parties to confer about a case  
24 management plan now that you are aware of the somewhat reduced  
25 number of players.

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1           When I come out, I will be asking you broadly what the  
2     time frame for discovery ought to be. Ordinarily I expect  
3     parties to get discovery done in about four months, and this  
4     case does not sound, as narrowed, particularly out of the  
5     ordinary. I will also want to get a sense of whether there are  
6     going to be any particular challenges that discovery presents.  
7     I am eager to hear the extent to which you have met and  
8     conferred about the content of discovery. We will talk about  
9     issues like that, about referring the case to the magistrate  
10    judge for settlement purposes, and the like. I am eager to  
11    understand what people think the likely trajectory of the case  
12    is with respect to the remaining parties.

13           I will see you in five minutes.

14           (Recess)

15           (Mr. Hugel, Ms. Corcoran, and Mr. Murphy not present)

16           THE COURT: Counsel, have you had a chance to confer?

17           Let me begin with plaintiff. Tell me what discovery  
18    from your perspective is going to be important in the context  
19    of this case. I think I understood the allegations well.  
20    Kindly speak into the mike. Thank you.

21           MR. PROSHANSKY: I think the discovery would be the  
22    usual, that is, documents, interrogatories, and depositions.

23           THE COURT: I understand the category level. Those  
24    are what you have a right to. Whose testimony, what records  
25    really is this going to turn on?







MR. McMAHON: Yes, Judge, and Mr. Proshansky alluded to it. He is starting a civil trial on October 9 that he can address. I think it is in this building as well. I have a February 18 trial before Judge Hellerstein, a multi-defendant



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1 Mafia case in this building, but I am just in the process of  
2 substituting in as counsel on a case before Judge Abrams in  
3 this building, a terrorism case, in which a firm trial date of  
4 December 3 has been set. It would be my hope to get Judge  
5 Abrams to push that trial, but the government previously --  
6 counsel for the defendant was Federal Defenders, and they had  
7 made a previous application for an adjournment of the trial,  
8 and the government vigorously opposed it. The application was  
9 granted although, as I say, vigorously defended. So while I'm  
10 hopeful that the December 3 date may be adjourned, I cannot  
11 count on that. So having said that, so that would be a  
12 December 3 date which I would be scrambling like crazy to get  
13 ready for that trial, and then, as I said, the February 18  
14 trial.

15 Be that as it may, Judge, if we could perhaps add two  
16 months on to your four-month normal expected --

17 THE COURT: If I do that, I'm going to make a note in  
18 our record that you really should not expect any further  
19 adjournments. In other words, I will give you the extra time  
20 now. I understand -- I am well familiar with you from prior  
21 life -- how hard you work and that you are in demand and you  
22 have a small shop, so I respect all that. At the same time, I  
23 don't want to be the victim of, you know, you have got to play  
24 the card you have got the case in front of Judge Engelmayer in  
25 this courthouse for the next thing that comes down the road.



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1 require a premotion conference, but my experience has been that  
2 those conferences are tremendously useful. Sometimes the  
3 motion simply goes away because there was a material dispute of  
4 fact and the exchange of letters or our conversation makes that  
5 obvious. Very often, even when the motion is destined to be  
6 made, the fact that we spend a half hour, 45 minutes together  
7 just results in my getting a much sharper, better organized set  
8 of papers. I can also often work with counsel to get you to  
9 agree to joint stipulated facts in which essentially you agree  
10 to 75, 80 or more percent of the facts at issue and leave for  
11 your 56.1 statements and oppositions really the only narrow  
12 minority of facts or alleged facts that are in dispute. That  
13 saves you a ton of time and organizes the facts nicely for me  
14 and my staff. And frankly, just my involvement in that  
15 discussion with you sometimes helps spot issues that you ought  
16 to address either because they are genuine issues or because I  
17 am just confused, but you will need to disabuse me of whatever  
18 I am confused about.

19 So for all those reasons, we will meet again on April  
20 24 at 10:30, and you should write that in to the case  
21 management plan.

22 Mr. Proshansky, are you anticipating any unusual  
23 challenges with the case, anything out of the ordinary,  
24 anything I need to attend to in this conference?

25 MR. PROSHANSKY: No, your Honor.

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1 THE COURT: How about you, Mr. McMahon?

2 MR. McMAHON: No, your Honor.

3 I would alert the court to the fact that  
4 Mr. Proshansky and I spoke while your Honor was in recess, and  
5 we are going to have settlement discussions. I don't think at  
6 this point we need a magistrate to be involved. It's a matter  
7 of meeting and conferring with my clients. But there is  
8 significant conversations being had on that front.

9 THE COURT: Good. I am delighted to hear that. Let  
10 me propose the following. Let me refer this to the magistrate  
11 judge for settlement purposes, but I will make the notation on  
12 the referral form, as I often do, that there is not to be any  
13 conference scheduled until both parties are ready. So it's a  
14 resource that you together can take off the shelf without  
15 having to badger me or delay. And I will make the notation  
16 that I always do which is that it is on plaintiff's counsel to  
17 reach out to the magistrate judge to the scheduling on both of  
18 your behalves, but only when you are both ready. So that way  
19 if I can't be reached or you just want to get on the magistrate  
20 judge's calendar, agree to it together, make a phone call.

21 MR. McMAHON: Okay.

22 MR. PROSHANSKY: Yes your Honor.

23 THE COURT: Mr. McMahon, I am delighted to hear that.  
24 I don't prejudge the facts of the case, but taking a look at  
25 the case, the volume of discovery and whatnot, I can certainly

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1 see where there would be economic wisdom to both sides to  
2 pursuing a settlement.

3 MR. McMAHON: Yes.

4 THE COURT: All right. Thank you. We stand  
5 adjourned. Tomorrow just get me the case management plan.

6 MR. PROSHANSKY: Will do.

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